IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 109

FEDERAL POWER COMMISSION, *et al.*

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 188

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 209

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

No. 212

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR INTERSTATE NATURAL GAS COMPANY, INCORPORATED.

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INDEX.

CASES CITED.

STATUTES CITED.

MISCELLANEOUS.

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Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 103-105) is reported at 166 F. 2d 796.

Jurisdiction.

The order of the Court of Appeals was entered May 12, 1948 (R. 109-112). Petitions for writs of certiorari in Nos. 109, 188, 209, and 212 were timely filed and the writs of certiorari were granted on October 11, 1948. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

Statement.

Since this brief is to be considered in all of the proceedings (Nos. 109, 188, 209, 212), it is necessary to point out the interest, if any, of each of the petitioners.

The Federal Power Commission ("Commission"), petitioner in No. 109, derives its authority, if any, in the premises from the Natural Gas Act of 1938 (c. 556, 52 Stat. 821, 15 U. S. C. Sec. 717, *et seq.*). The rate case instituted before it was finally determined in its favor by your Honorable Court in *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U. S. 682 (rehearing denied October 13, 1947, 332 U. S. 785). Commencing with October, 1947, this respondent, Interstate Natural Gas Company ("Interstate"), billed for its gas sales at the Commission prescribed rate (R. 18). Schedules were filed in December, 1947, in compliance with the Commission's order, making the reduced rates effective back to June 15, 1943 (R. 56, 57, 104).

The Public Service Commission of the State of Missouri ("Missouri Commission"), petitioner in No. 188, represents only Missouri consumers receiving gas indirectly from Mississippi River Fuel Corporation ("Mississippi") (R. 92); and the Illinois Commerce Commission ("Illinois

Commission") represents only Illinois consumers receiving gas indirectly from Mississippi (R. 68). The Commission entered a rate order against Mississippi (4 F. P. C. 340) which subsequently was reviewed and remanded by the Court of Appeals for the District of Columbia (163 F. 2d 433) and settled by stipulation on May 4, 1948, which stipulation was adopted by the Commission on July 20, 1948. By said stipulation Mississippi gives effect to that portion of the rate order in the *Interstate* case accruing since January 20, 1946, the effective date of the Power Commission's remanded order against Mississippi. (See Commission brief, p. 56, and Appendices A and B to brief of Mississippi in Opposition to Petitioners for Certiorari.)

The Memphis Light, Gas and Water Division of the City of Memphis, Tennessee ("Memphis"), petitioner in No. 209, purchases its natural gas requirements from Memphis Natural Gas Company ("Memphis Natural"). Memphis is not subject to regulation and it claims a part of the fund awardable to Memphis Natural in its corporate capacity and not for distribution to any consumer in fact (R. 25-26).

While this brief is in response to all of the arguments in Nos. 109, 188, 209 and 212, Interstate does not thereby indicate that the cases should be considered jointly. On the contrary, each must sustain its own burden in attempting to reverse the court below.

SUMMARY OF ARGUMENT.

I.

An examination of the opinion of the court below will demonstrate that it did not act under any sense of compulsion from *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138.

II.

The issues presented in the several cases at bar are distinguishable from those instances in which a business affected with a public interest has claimed part or all of funds impounded or segregated. This respondent now makes no claim whatsoever to the funds paid into the registry of the court below. In addition, in the authorities which the Power Commission maintains supports its arguments, claims to the funds were being made by those immediately in contact with the particular regulated business which had been found at fault. In no pronouncement of this Court has it been indicated that awards should be made beyond those immediately in contact with the regulated business which has been found guilty of an illegal practice or exaction.

The arguments of the Power Commission apparently pass by the important point that the funds which have been accumulated represent those collected by the three purchasing pipe line companies from both direct and indirect industrial consumers as well as from domestic consumers. It is impossible from the Commission's argument to ascertain whether all "ultimate consumers," including industrial both direct and indirect, or only domestic consumers are to be the object of concern in the distribution of the fund.

III.

The court below had a large measure of discretion in the management of the fund and disposed of it in the only way which was consistent with its jurisdiction. In order for the court to have made any other disposition of the fund, it would have been necessary for it to have engaged in all of the mechanics of making rates not only as to the unknown portion of the fund which represented revenues from sales regulable under the Natural Gas Act, but also as to the portion of the fund arising from sales which have been declared by this Court to be regulable only by the states. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U. S. 507. As a matter of fact, the Power Commission itself in the past has recognized that the rights in a fund such as this are in the natural-gas companies making the immediate payment on account of which the funds have been accumulated.

This is not a case in which the Court should be compelled to set up rates and engage in the policy-making functions which are necessary in order to determine rates not only federally regulable but state regulable. This Court should not be placed in the position of ordering the court below to determine what are the proper rate criteria and rate conclusions which the competent states should proclaim. Nor should it be required to engage in what amounts to awarding reparations, contrary to the policy of Congress.

IV.

No one of the petitioners in these cases is now competent to maintain this review proceeding. The Federal Power Commission is an agency of limited natural gas rate-fixing

authority. It is implicit in the Natural Gas Act itself that the Commission does not have the standing of a representative of ultimate consumers whose interests would adequately be represented by competent state agencies. The two state agencies involved now represent only moot issues since the settlement by the Power Commission of its rate case against Mississippi River Fuel Corporation has given effect to the Interstate reduction to the same extent as though no stay order had ever been entered in the Interstate case. The Memphis Light, Gas & Water Division adopts the arguments of the Power Commission which are premised upon the notion that "ultimate consumers" should be the recipients of the fund. Memphis Light, Gas & Water Division claims, however, that only it is entitled to that portion of the fund represented by the sales to its consumers.

ARGUMENT.

I.

Introduction.

The argument of the Commission and likewise of all other petitioners herein is directed mainly at the case of *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138. It will be the purpose of Interstate to demonstrate that not only did the court below not feel "compelled" to follow the *Central States* case, but that it reached the only proper result under the circumstances.

II.

The argument of the Federal Power Commission.

The real problem in this case is not in deciding whether the *Central States* case is applicable; it is a consideration of the applicable and distinguishing facts of this case which makes it different from all others cited by petitioners.

In the first place, this respondent was the company seeking the review to which the impoundment of excess charges was ancillary. This respondent lost its review proceedings and now is desirous of immediate discharge from liability on account of the excess payments during the impoundment period.[1] It justly desires to be free of the exorbitant costs and delays which might be imposed upon it if the mere driplets of the fund were ever to find their way to the so called "ultimate consumers". Interstate has not claimed the fund (R. 103) and hereby disclaims its right to the fund as compensatory for any costs of gas sold. This fact in and of itself distinguishes this case from those in which the company whose rates were attacked or who paid less than the legal rate sought to collect back an illegal rate. See *Inland Steel Co. v. United States*, 306 U. S. 153; *United States v. Morgan*, 307 U. S. 183; *Ex parte Lincoln Gas and Electric Co.*, 256 U. S. 512.

In all of the rate cases cited by the Commission the fund was claimed by or for the persons who had to pay the illegal rate pending review. Here only the pipe line companies to

[1] The comparatively small amounts which "ultimate consumers" would be entitled to is evident from the data at page 30 of the Record which shows amounts allegedly allocable to distribution companies. These companies in turn would have to allocate to their customers. Interstate provided only a small portion of each of its immediate customers' total needs (R. 36-37, 88, 95).

which award was made below paid this respondent's illegal rate. The policy of these cases was that the company exacting the rate or charge successfully attacked should not benefit from the fact that a stay had been granted. This respondent will not so benefit by the action of the court below. The Commission cites *Ex parte Lincoln Gas and Electric Company* (256 U. S. 512) "as particularly relevant" on the point that the fact of no privity between Interstate and "ultimate consumers" is not important. That case did not treat of lack of privity in the sale of gas to the citizens but on the basis that a municipal corporation was representative of its citizens. The illegal rate was exacted from these citizens and not from the representative party. The question was one only of whether there was privity in the litigation. The case has no applicability on the point for which it is cited.

In no case has award been made or indicated beyond the point of immediate contact with the one whose rate or benefit has been declared unreasonable. For instance: in *Inland Steel Co.* v. *United States (supra)*, no award was made to other shippers because they had to pay greater amounts because of a discriminatory practice in reimbursement for spotting cars; in *United States* v. *Morgan (supra)* the question was "whether upon a redetermination of that issue [reasonableness of rates] by the Secretary the district court will have, and should exercise, the power to order distribution of the impounded fund in conformity to his determination by directing that so much, if any, of the amounts paid into court as exceeds the rates ultimately determined upon appropriate review of the Secretary's findings to be just and reasonable be returned to those who have paid them". (307 U. S. at 188). This Court in no wise indicated that those

who dealt with the ones paying the excess charges either mediately or immediately should be the object of concern to the district court. Again in *Atlantic Coast Line Co.* v. *Florida* (295 U. S. 301) Justice Cardozo refused restitution to shippers who paid a higher rate later reversed instead of a rate still effective but discriminatorily too low and the carrier was allowed to keep interim charges over said rate. There was no award to those who were discriminated against.

To Commission's assertion that "the ultimate consumers are equitably entitled to receive the impounded fund" (Commission brief, p. 21), answer can be made that the equities here in favor of remote parties are no stronger than in the cases discussed above where a fund or a claim arises from a stay order. In fact some of these same cases are cited by the Commission to sustain the quoted point but obviously they fail to do so. In *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ruy. Co.* (249 U. S. 134), also cited on the point by the Commission, the claim was made by a shipper who paid the excess charge—not by any remote party who may have had to pay some indefinite increased costs for the shipper's product. "What was wrongfully done by the process", for which restitution should be made can be definitely determined only with reference to the ones who paid the price to the recipient of the benefits of the stay. To go beyond that point, Interstate will demonstrate, requires those determinations which are policy and rate making in nature.

While the purpose of the Natural Gas Act may have been to protect consumers as indicated in *Federal Power Commission* v. *Hope Natural Gas Co.* (320 U. S. 581, 610, 612) that act adopted a limited means of accomplishing that end as the majority decided in *Central States* (*supra*,

324 U. S. at 144). The fact is that no consumer even has standing before the Commission to complain of a rate. The jurisdiction of the Commission to proceed in a rate case is "upon its motion or upon complaint of any State, municipality, State Commission, or gas distributing company * * *" (Natural Gas Act, Sec. 5(a), 15 U. S. C. Sec. 717d). This adds nothing to the equities of "ultimate consumers" which the Commission attempts to conjure up in this case. Indeed it is difficult to determine just what the Commission means by "consumers" and "ultimate consumers". While all gas (except that lost through leakage) reaches a consumer some time and the term "consumer" therefore must comprehend *all* who use the gas, the Commission appears to be talking about not consumers generally but "domestic users" (p. 25 and note 9, *id*). This class within a class is lifted from a partial quotation from Justice Jackson's dissent in the *Hope* case (320 U. S. at 659) and out of text the Commission attempts to warp the sense of the quotation. Justice Jackson there was speaking of awarding the whole of a reduction to domestic users because of discrimination against them. The discrimination Justice Jackson was speaking of arose from the Commission order. The matter is dealt with also in the majority opinion (320 U. S. at 617-618). No such discrimination between the domestic and nondomestic user is involved here. If, however, only domestic users are the possessors of these synthesized equities, the argument becomes self-contradictory. Assuming equities in the consumers, these equities must be in all consumers under sales both regulable (which will include resale industrial gas) and nonregulable by the Commission. Interstate respectfully submits that this is a correct analysis of the Commission's argument on the

question of the equities. It all serves to point up the argument to be made under Part II of this brief that the court below reached the only proper and realistic result and could, and in effect did, do so on grounds other than the *Central States* case. The argument under Part II will answer adequately the remainder of the Commission's contentions in respect of either overruling or distinguishing the *Central States* case.

Before leaving this discussion, two more specific matters must not go unchallenged.

At page 41 of its brief the Commission contends that "The doctrine of the *Central States* case encourages frivolous litigation." It then goes on to recite an affiliation then but not now existing between Interstate and Mississippi River Fuel Corporation as illustrative of this. Naturally since affiliation is no longer present, there will be no shifting of "the amount of reduction from the treasury of one subsidiary to another" (p. 43). But for the Commission to indicate that the doctrine of *Central States* encouraged the review which Interstate had sought indeed imputes remarkable acumen to this respondent since the stay order was entered July 15, 1943 (R. 3), and the *Central States* case was not decided by this Court until February 15, 1945.

The Commission (pp. 44 *et seq.*) also urges that this would be a proper instance in which the Court could overrule *Central States* because it pertains to separation of powers. It is apparent that the policy of the Commission is indirectly to award reparations contrary to the policy of Congress in not granting such power to the Commission or to any body or tribunal in natural gas rate cases. Congress certainly was aware of the fact that it could have granted such power (*Dayton-Goose Creek Railway* v.

United States, 263 U. S. 456) so it must be assumed that it did not wish to do so. Interstate respectfully submits therefore that this Court should not now act contrary to this clear congressional policy.

The Commission's final contention relates to a difference in the terms of the stay order entered in the *Central States* case and that entered by the court below. It would seem abundantly clear that the court below was acting or attempting to act in a manner consistent with the policy and terms of the Natural Gas Act. Properly it could take no other course. It is shown in the immediately preceding paragraph that the court attended to this Congressional policy. The stay order itself, however, is by no means conclusive. In exercising its equity powers the court below "entered into no contract or understanding as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity * * *." *United States* v. *Morgan*, 307 U. S. 183 at 194.

III.

The order of the court below should be affirmed.

Since the Commission brief (in which all other petitioners concur) in essence asked that *Central States Electric Company* v. *Muscatine* (*supra*) be overruled or distinguished and that the funds be awarded to "ultimate consumers" (or, perhaps, just the domestic consumers, the Commission apparently does not know which), it is important to inquire whether the court below was "compelled" as contended by the Commission, to reach its result on the basis of the *Central States* case. Interstate will show that

the result reached was proper without reference to *Central States*.

A. What the court below did.

The court below after "A careful consideration of the opposing contentions, in the light of the undisputed facts" (R. 105) felt that its only course was to award to the pipe line companies privy to the contracts with Interstate the amounts which they paid and that if others have rights in any part of the fund, it was not that court's duty "to search out or declare them" (*id.*). The court merely cited the *Central States* case in a footnote and without comment. Thus it is clear that the contentions plus the facts really moved the court to its conclusion. The court did, however, preserve the rights, if any, in the distributive parts of the funds of others by stating that its action was without prejudice to such rights, if any.

Contrary to the erroneous contention of the petitioners here that the court below reached its result under a feeling of compulsion from the *Central States* case, the fact is that the court had the breadth of discretion in the premises given to an equity court of original jurisdiction, (see Illinois Commission certiorari brief, pp. 22 *et seq.*) and in exercising this discretion it reached a result based upon a proper evaluation of facts, contentions, and equities (see Part "B" sub). Regardless of the dissatisfaction of petitioners with the *Central States* case, however, that case does propound the principle that a federal court as such has no rate fixing authority. 324 U. S. 138, 143. This is no new pronouncement but has been the law for some time. *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264; *Newton* v. *Consolidated Gas Company*, 258 U. S. 165, 177.

It will be shown that the judgment of the court below was otherwise fully justified without any support from the majority view of the *Central States* case.

B. The court below could exercise discretion.

The Natural Gas Act provides for court review (Section 19 (b), 15 U. S. C. Sec. 717r(b)) and means for securing a stay (Section 19 (c), 15 U. S. C. Sec. 717r(c)). It is within the court's discretion whether a stay will or will not be granted. (See *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 9-11), and it also is within its discretion whether it will impose any condition—such as impoundment.[2] The reviewing court, therefore, is exercising equitable powers to which a great measure of discretion attaches. *Inland Steel Company* v. *United States et al.*, 306 U. S. 153; *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364; see also dissent by Mr. Justice Douglas in *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138, 152.

The inquiry, therefore, must be to whether this discretion has been abused.

Conflicting claims arising out of rate determinations are similar to causes of action for restitution—a remedy equitable in origin and function. Cf. *Atlantic Coast Line Railway Co.* v. *Florida et al.*, 295 U. S. 301, 309. In that case it was stated:

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[2] In *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, this Court, per Stone, J., stated (at 271):

"The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State R. Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153, 25 L. ed.

"Restitution is not of mere right. It is *ex gratia*; resting in the exercise of a sound discretion and the court will not order it where the justice of the case does not call for it * * *" (*id.* at 310).

The case which best illustrates the breadth of discretion involved is *Inland Steel Company* v. *United States, et al.* (306 U. S. 153). In that case this Court spoke of the discretion lodged in a court of equity in a case such as this in terms which indicate clearly that the discretion as to the granting of a stay order with or without conditions is very broad and also in such a way that, along with the authority of *Ford Motor Company* v. *N. L. R. B.* (305 U. S. 364), there is ample authority for the statement by Mr. Justice Douglas in his dissent in *Central States Electric Company* v. *City of Muscatine* (*supra*) that "* * * the federal court which has this fund has considerable discretion in its management. *United States* v. *Morgan, supra.* I fail to see how it abused its discretion in handing the fund over to the officials."

C. There was no abuse of discretion by the court below.

Given the large measure of discretion lodged in the court below, it is proper to analyze briefly just how the court

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903; *Peoples Nat. Bank* v. *Marye*, 191 U. S. 272, 287, 48 L. ed. 180, 187, 24 S. Ct. 68; see *Norwood* v. *Baker*, 172 U. S. 269, 294, 43 L. ed. 443, 453, 19 S. Ct. 187. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such substituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience. *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338, 77 L. ed. 1208, 1211, 53 S. Ct. 602. It may prescribe the performance of conditions designed to protect the rights of the parties pending appeal, *Hovey* v. *McDonald*, 109 U. S. 150, 157, 27 L. ed. 888, 890, 3 S. Ct. 136, or to protect temporarily the public interest while its decree is being carried into effect. See *Consolidated Gas Co.* v. *Newton* (D. C.), 267 Fed. 231, 273; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 66 L. ed. 538, 42 S. Ct. 264."

exercise its discretion both in respect of applicable facts and applicable law.

(i) The Fund and Its Origin.

Beginning not later than July 30, 1943, Interstate deposited in the registry of the court below the monthly difference between payments under the old rates and those rates required by Power Commission order. These deposits continued through October, 1947. On bills rendered for gas purchased after October 1, 1947, Interstate gave effect to the Power Commission rate order. On final reckoning, it was determined that more money than had been impounded had been paid by the three purchasing pipe line companies, and Interstate admits this additional liability (R. 16-19). All these funds, "of which $1,484,582 is applicable to excess charges to Mississippi River Fuel Corporation; $688,156 is applicable to excess charges to Southern Natural Gas Company; and $344,606 is applicable to excess charges to United Gas ~~Pipe Line~~ Company [for account of Memphis Natural Gas Company] from June 15, 1943 to December 10, 1945; and $247,859 is applicable to excess charges to Memphis Natural Gas Company from December 10, 1945 through September, 1947," represent the difference between the attacked and the prescribed rates (R. 110).

~~There is no dispute~~ that the above three pipe lines bought gas immediately from Interstate and that they directly paid to Interstate the funds now in dispute (R. 57). The position of petitioners, however, is that the pipe lines paid Interstate the money collected mediately from consumers. How much of this, had the reduction been effective at once, would have stayed in the pipe line companies'

hands is purely speculative and dependent entirely upon the reasonableness of their rates at the times of collection.

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed." *Board of Trade* v. *United States*, 314 U. S. 534 at 546.

The Commission itself recognizes this in its findings to the order accepting Mississippi's proposed new rates settling that company's rate case.[3]

(ii) The Power Commission's Attitude.

The Power Commission, as contrasted with its counsel now taking an apparently contrary position, has recognized that within the constitutional regulatory scheme these pipe lines are enlitled to the funds now impounded and owed to

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[3] "During the interval from January 20, 1946, to the present date Corporation has made extensive additions to its pipe line system to meet the increasing demands of ultimate consumers served by the gas distribution companies served by Corporation. These increments to pipe-line capacity have resulted in greatly changed factors in the costs and operations of Corporation's pipe line system. . . .

"In view of these circumstances and the prospect of further increasing costs and changes in methods of operations it appears necessary in the public interest that adjustments equitable to both ultimate consumers and Corporation should be made in the rates and charges heretofore ordered by the Commission commensurate with the service Corporation has been and now is being called upon to render to its gas distribution company customers for resale to ultimate consumers. Corporation's conditions of service now vary greatly from the conditions of service considered by the Commission when it issued its order of November 9, 1945."

(See Appendix A to brief of Mississippi in opposition to petitions for certiorari, pp. viii-ix.)

them." While there is not strict contemporaneity between the Natural Gas Act and the pronouncement set forth in footnote 4, still the Commission's construction of the powers given to it is entitled to weight by the courts. *Great Northern Railway Company* v. *United States*, 315 U. S. 262, 275; *cf. Secondig* v. *Washington Water Power Co.*, 265 U. S. 322; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 367.

(iii) Any Other Result Would Require the Court to Engage in Rate Making.

It is well recognized that it is not part of the judicial process to engage in the legislative function of making rates. *Central States Electric Company* v. *City of Muscatine*, 324 U. S. 138, 143; *Central Kentucky Natural Gas Company* v. *Railroad Commission*, 290 U. S. 264; *Newton* v. *Consolidated Gas Company*, 258 U. S. 165, 177. Yet, if the court below had done what the petitioners contend should have been done, judicial rate making would have been the inevitable consequence. The Commission distin-

"The cost of gas purchased by Mississippi from its affiliate, Interstate Natural Gas Company, will decrease in the event the reviewing Court upholds this Commission's 1943 order reducing the rate by $301,329. The prescribed rate has been stayed pending Court review and the excess revenues over the ordered rate are being impounded. Mississippi will receive an unearned windfall when the rate is declared valid by the Court and refunds ordered. Under the authority to fix rates for the future, however, the Commission will direct Mississippi to pass on the proper portion of that reduction to the customers purchasing gas for resale. This cost of gas purchased by Mississippi is a 'commodity' charge; and when final judicial review validates the reduction, Mississippi should reduce its rates to the seven utility customers by the proportion of the volumes of gas it sells to these utilities to the total volume of gas sales in the year of the final judicial decision." (F. P. C. Opinion No. 126, In re: Mississippi River Fuel Corporation, *et al.*, Docket No. G-462, 4 F. P. C. 340 at 359; R. 74.)

guishes the situation presented here by noting that the evaluation of the fairness of past rates is a judicial rather than a legislative function. The fact of the matter is that legislative characteristics can arise in determining the fairness of even past rates if the concern will be one primarily of making policy on the myriad of facts. Rate making certainly will be necessary and whether for the future or the past, premises of policy will necessarily have to be decided upon. All three of the purchasing pipe line companies make sales for resale as well as direct sales for consumption (R. 55-56). The former are regulable by

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[3] The *Attorney General's Manual on the Administrative Procedure Act* (1947) states this very succinctly and well at page 14:

> "More broadly, the entire Act is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941), pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted. Sen. Rep., p. 39 (Sen. Doc., p. 225); 92 Cong. Rec. 5648 (Sen. Doc., p. 353)."

the Commission; the latter by state authorities if appropriate state legislation to that end exists. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U. S. 507. If all of the claimed funds were handed out to just domestic consumers or even all so called "ultimate consumers", the court, contrary to the assertions of the Commission, would be indulging in local law and would impinge upon local regulation—a fact really recognized in the Commission brief on its petition for certiorari (p. 10n). That rate making is involved is indisputable since some of the funds result from sales that are only regulable by states. Therefore, the court below would have had to make an allocation of the fund. But how? On what basis can it do so without engaging in a rate making function? It must be emphasized that each pipe line company paid Interstate the total purchase price for *all* gas regardless of who ultimately would use it or purchase it. Therefore, the fund represents amounts paid for federally-regulable as well as state-regulable gas sales. Thus, to give to each consumer his just due, assuming his right thereto, would inevitably require an allocation not only of the jurisdictional factors but also an allocation of that part of the fund paid by each purchasing pipe line company. It would entail an entry into a myriad of questions of fact and none of law. Cf. *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581, 590. To make such an allocation would require the determination, *inter alia*, of a return to which each pipe line was entitled from its direct state-regulable sales and thus a determination of the proper state rate for each state. This may not only be required for the whole impoundment period but requirements of justice and equity might require it for each of the forty months in

which payments were made into the registry of the court since the fairness or unfairness of rates is an ever changing thing. Considering these factors, there is no way of telling how much any consumer is entitled to without valid and complete rate determinations. Also, it would be necessary to determine the extent of every state's exercise of its authority not only to regulate the direct sales within its jurisdiction but also to award reparations therefor. On none of these was the court below advised. Conceivably, if the court below had awarded the fund to all consumers, a pipe line company might find itself muleted further and for the same sales by a subsequent award of reparations by a competent state agency.

Bearing in mind that a federal court may not engage in rate making because it is not a judicial power and, in state-regulable matters because it is a function reserved to the states (*Central Kentucky Natural Gas Company v. Railroad Commission*, 290 U. S. 264, 271), it would be hopelessly impracticable and unfair, as well as a usurpation of legislative and state functions for a court as an incident of review to enter the uncertain field of rate determination. See *Atlantic Coast Line Railroad Co. v. Florida*, 295 U. S. 301, where Mr. Justice Cardozo, in respect of restitution awards after a rate determination, stated at pages 317-318:

> "The present record does not satisfy us that a new scale should be set up to govern claims for restitution. The field of inquiry is one in which the search for certainty is futile. Opinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates. There is a zone of reasonableness within which judgment is at large."

Here, Justice Cardozo was concerned with the practical aspects of the situation presented and he recognized that if restitution was to be made, a new scale of rates, retroactive in effect, would have to be used for that purpose. This the court refused to do. That case, however, was comparatively simple when compared to those presented here. In the *Atlantic Coast Line* case, the federal authority was in position of complete constitutional and statutory dominance over the situation and any zone of reasonableness related only to the criteria of rate making under one authority. In the cases at bar, however, in addition to the same zone of reasonableness in the criteria of rate making under the Natural Gas Act, there would be the same zone where only the states are competent to act; and, also, there would be a zone of naked assumptions as to the desire or authority of the states to act as well as the applicable rate making criteria of the states.

(iv) Conclusion As to the Exercise of Discretion.

It seems clear that the court below had only the course which it adopted in the management of the fund. Faced with the facts that the three pipe line companies paid the money to Interstate; that only these companies were in privity with Interstate; that Interstate would not secure any benefits from the impoundment; that some of the sales by the pipe line companies were subject only to state regulation if at all; that the rate situation of at least one purchaser (Mississippi River Fuel Corporation) was never stabilized until well after the impoundment period and that the other companies underwent rate changes during that period; and that it could pass on any interest in the fund beyond these companies only by indulging in the non-judicial and extra

jurisdictional activity of federal and state rate making, it seems clear that the court exercised not only sound discretion but acted in the only manner consistent with the applicable law and the realities of the situation.

IV.

The writs of certiorari should be vacated for lack of proper parties.

Interstate contends that none of the petitioners in these several cases, have the standing to seek review either because of no interest or because their interest is inconsistent with the stand taken.

A. Principles of Law.

Of long standing is the general rule that the jurisdiction of the Supreme Court can be invoked only by one having a personal interest in the litigation, and not merely an official one. *Smith* v. *State of Indiana ex rel. Lewis,* 191 U. S. 138, 148-149. And this interest must be such that not only will a benefit to policy result but one must stand to have property diminished, burdens increased or rights detrimentally affected by the order up for review. *McCandless* v. *Pratt,* 211 U. S. 437, 443, 445; *Farmers Loan & Trust Company* v. *Waterman,* 106 U. S. 265; *In re Michigan-Ohio Boulevard Corporation,* 117 F. 2d 191 (C. C. A. 7); see *Barriger* v. *Louisville Gas & Electric Company,* 196 Ky. 268, 244 S. W. 690, 31 A. L. R. 1408, 1411. "The interest must be substantial, and a merely nominal party to an action cannot appeal." *Hamilton Trust Company* v. *Cornucopia Mines Company, et al.,* 223 Fed. 494 (C. C. A. 9, 1915, cert. den'd 239 U. S. 641); *Ohio Contract Carrier Association* v. *Public Utility Commission,* 140 Ohio St. 160,

42 N. E. 2d 758, 759 (Ohio Sup. Ct., 1942). Aside from the position of the parties in respect of interest and aggrievement, it also is necessary that a justiciable cause be presented to the court—not one asking for "a gratuitous advisory judgment" upon a matter which has become moot by supervening events. *Public Utilities Commission of Ohio et al.* v. *United Fuel Gas Company et al.*, 317 U. S. 456, 466. That the United States is seeking review, does not lessen the jurisdictional strictures (*United States* v. *Union Pacific Railroad Company*, 105 U. S. 263) unless there is some special statutory provision. See *United States* v. *Maria De La Paz Valdez De Conway et al.*, 175 U. S. 60, 69-70. Certainly an agency of a government department would have no greater rights.

In the light of the foregoing principles, Interstate respectfully submits that the petitioners in these cases do not meet the required jurisdictional tests.

B. The Federal Power Commission.

The Power Commission has carried through successfully all that it set out to do and could do under its organic law,—i.e., the Natural Gas Act. That Act sets forth what the functions of that Commission are and what it may do. Its legitimate work in reference to the rates in controversy ceases on the final affirmance by this Court of the rate determination.

The Power Commission stood no loss, nor did it stand to be detrimentally affected by the disposition of the fund. Its position was only an official one and that of a nominal party only since the matter of distribution of impounded funds was docketed as the appeal to the Circuit Court had been docketed. The most that could be said for the Power Commission is that it is interested in the policy involved.

From the requirements of the situation of parties seeking review set forth above, it is clear that the Power Commission has no standing in this Court. It seems clear, also, that the Power Commission, if it is to be heard at all, should stand in the position of *amicus curiae* because of its obvious general interest in the question involved. This is provided for adequately in your Honorable Court's Rule 28 which gives to the Commission the opportunity as of right to appear in such role.

The Power Commission does not represent the consumers as do local and state commissions. (See *Arkadelphia Milling Company* v. *St. Louis Southwestern Railway Company, et al.*, 249 U. S. 134, 146). The consumers are the ultimate distributees of gas and, as such, are bound inextricably with the distribution function. While protection of consumers at retail may have been the purpose of the Natural Gas Act, the means adopted were limited in scope and comprehended only the Commission's participation in the wholesale function.[6] The Act has no application "to the local distribution of natural gas or to the facilities used for such distribution * * *." Section 1(b), 15 U. S. C. 717(b). Indeed, no consumer even has standing before the Power Commission to complain of a rate over which it has jurisdiction. The jurisdiction to proceed on a rate case is

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[6] "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted were limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act but from the exceptionally explicit legislative record, and from this court's decisions" (*Central States Electric Co.* v. *City of Muscatine*, 324 U. S. 138 at 144.)

given to the Power Commission only "upon its own motion or upon complaint of any State, municipality, State Commission, or gas distributing company * * *."

C. The Missouri Commission and the Illinois Commission.

Interstate does not assert that state commissions do not represent the consumers within their respective bounds. Beyond that, however, all of the principles set forth above in respect of a party's right to seek review are applicable. It has been pointed out that these state commissions represent consumers who get their gas only through Mississippi River Fuel Corporation in so far as this case is concerned. Consequently, it is the rate situation of Mississippi which is involved. Mississippi, as the Power Commission

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[7] Natural Gas Act, *supra*, Sec. 5(a), 15 U. S. C. Sec. 717d(a), which provides in the part material here as follows:

"Sec. 5(a). Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: * * *."

Section 13, 15 U. S. C. Sec. 717*l*, provides:

"Sec. 13. Any State, municipality, or State commission complaining of anything done or omitted to be done by any natural-gas company in contravention of the provisions of this act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such natural-gas company, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission."

and the Missouri and Illinois Commissions admit (Commission brief, p. 56; Stipulation, Appendix A to opposition brief of Mississippi; Illinois Commission brief on certiorari, p. 18n), has given effect to the Interstate rate reduction back to January 20, 1946, the date when the Power Commission's rate order against Mississippi was to be effective and the old rates found to be excessive were no longer of any effect. Thus, all distributing utilities in Missouri and Illinois who were supplied by Mississippi have received all benefits to which they are entitled under the rate reduction order against Mississippi. The funds impounded prior to that time in the court below represented money paid to Mississippi under the only legally effective rate then in force and free of any claim for reparations. (See *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 618; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Company*, 162 F. 2d 388 (C. C. A. 5))[8].

It is apparent, therefore, that Mississippi's customers have gained all that they could have received—in the same manner and to the same extent if a stay had not been granted in the Interstate rate case and if Mississippi had, on January 20, 1946, put into effect and passed on the benefits of the wholesale price it paid to Interstate. It is earnestly contended, therefore, that the consumers have the right to receive their due from the utility distributors no matter

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[8] In this connection it should be noted that the Power Commission's own rules provide:

> "No natural gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the Commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the Commission, unless the Commission shall, for good cause shown, otherwise provide by order." (General Rules and Regulations of Federal Power Commission (Effective Jan. 1, 1948), Part 154.2, Fed. Reg. 8598.)

what is the outcome of these causes. They could not have obtained any more had the Commission rate reduction orders never been contested. Thus benefited, questions as to their rights are no longer justiciable and the grant of certiorari should therefore be vacated.

D. Memphis Light, Gas and Water Division.

This petitioner apparently is a proprietary department of the City of Memphis, Tennessee (R. 25). In that capacity it claims that it is the "ultimate consumer" entitled to share in the refund (R. 26). Obviously this petitioner is not an "ultimate consumer" but is an intermediary the same as a distribution company would be. There is no showing that the rates to Memphis citizens would be reduced by payment to this city department nor, assuming equities in "ultimate consumers," that it could, on behalf of said citizens, give a proper release and acquittance if the fund would be awarded to ultimate consumers. It is not acting as representative of a class of claimants (Cf. *Ex parte Lincoln Gas and Electric Company*, 256 U. S. 512) but is acting purely and expressly for itself. There is no evidence of its rights or equities in this case and without such rights or interest in itself or in those it represents, it does not have the requisite interest on this review.

The Memphis Light, Gas and Water Division has adopted the brief and argument filed on behalf of the Commission. To do so immediately points up a false assumption: it argues, per the Commission brief, for distribution to ultimate consumers but claims the fund only for itself.

Conclusion.

Interstate maintains that the order of the court below must be affirmed because the court acted in the sound exer-

cise of discretion in the management of the fund and reached the only result consistent with its limited powers. The Court below could not have disposed of the matter otherwise without indulging in retroactive rate making not only of federally but also state regulable matters. The result reached would have been the only proper one without any teachings from the *Central States* case and the court did not act under a feeling of compulsion from that case.

In addition, no petitioner in these cases now represents claims of the ultimate consumers whose alleged rights and equities arising from the grant of the stay order they urge. The Missouri and Illinois Commissions, while competent to act, are the advocates only of moot questions since customers in their respective states will gain all benefits they would have derived had a stay never been entered in the Interstate case. The Power Commission is a body of limited representative right and under the Natural Gas Act does not now represent ultimate consumers. The Memphis Light, Gas & Water Division while it argues for the ultimate consumers, claims a share in the fund in its own corporate right.

It is respectfully submitted, therefore, that the order of the court below should be affirmed; or, in the alternative, the grant of writs of certiorari should be vacated for lack of proper parties or justiciable issues.

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